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In The
Supreme Court of the United States

RAFAEL GARCIA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petition for Writ of Certiorari

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QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH *MURRAY v. UNITED STATES*, 487 U.S. 533, 108 S.Ct. 2529, 101 L.Ed.2d 472 (1988).

II.

WHETHER THE REDACTION APPROACH OF *FRANKS v. DELAWARE*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978) APPLIES TO THE INCLUSION OF ILLEGALLY OBTAINED INFORMATION IN AN AFFIDAVIT FOR A SEARCH WARRANT.

III.

WHETHER THE FEDERAL MAGISTRATES ACT AUTHORIZES A MAGISTRATE TO HEAR, OVER THE OBJECTION OF A PARTY, THE TESTIMONY OF ONLY ONE OF SEVERAL WITNESSES IN A SUPPRESSION MATTER AND OPINE FOR THE DISTRICT JUDGE, WHO THEREAFTER HEARS THE BALANCE OF THE MATTER, WHETHER THAT ONE WITNESS WAS CREDIBLE.

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The opinion of the Court of Appeals is reproduced in the Appendix filed herewith ("App.") at App. 1 and is reported as *United States v. Chaves*, 169 F.3d 687 (11th Cir.1999).

STATEMENT OF THE BASIS FOR JURISDICTION

The judgment sought to be reviewed is the decision of the United States Court of Appeals for the Eleventh Circuit which is published in the Federal Reporter as *United States v. Chaves*, 169 F.3d 687 (11th Cir.1999). The decision was entered on March 9, 1999, and rehearing was denied on June 29, 1999. A timely filed application for extension of time within which to file a petition for writ of certiorari was granted to October 22, 1999. The statutory provision believed to confer on this Court jurisdiction to review on a writ of certiorari the judgment in question is 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment IV provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Title 28 of the United States Code, § 636 provides:

> (b)(1) Notwithstanding any provision of law to the contrary -

(A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.

(B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

STATEMENT OF THE CASE

Based upon information from a confidential informant, agents of the Drug Enforcement Administration [DEA] developed a plan to seize a shipment of 240 kilograms of cocaine. The informant was to provide the keys to his van to a third person who would pick up the drugs and return with the van. The DEA agents surveyed the shopping mall where the hand-off of the keys took place. The agents did not see the person to whom the informant gave the keys. The DEA agents, however, did see Frank Chaves drive off in the informant's

van. Chaves stopped at a warehouse which was placed under surveillance. Chaves departed a short time thereafter and drove the van to a restaurant and entered. While Chaves was in the restaurant, DEA agents looked into the van and saw several boxes. Chaves was arrested and the van was searched. The boxes contained 240 kilograms of cocaine. (App. 1-2).

After Chaves was arrested, the petitioner, Rafael Garcia, was observed exiting the warehouse along with John Torres. They were arrested. Agents attempted to enter the warehouse but the door of the warehouse was locked. Keys taken from the petitioner and Torres did not open the warehouse. The agents at the warehouse waited approximately forty-five minutes outside the warehouse with Torres and the petitioner in custody. The agents at the warehouse were joined by the agents who arrested Chaves. The agents conducted a warrantless entry of the warehouse by "jimmying" the locked door. The agents conducted a sweep of the warehouse. Inside the warehouse, the agents observed boxes similar to those found in the van. (App. 2).

A search warrant affidavit was drafted relying upon information obtained both before and as a result of the warrantless entry. (App. 2, 14-15). The affidavit failed to mention that the agents had broken into the warehouse but did state that the agents had observed in the warehouse cardboard boxes similar to those found in the van driven by Chaves. (App. 14-15). A search warrant was obtained and 400 kilograms of cocaine were found in the warehouse. (App. 2-3).

The petitioner, Chaves, and Torres were indicted and moved to suppress the evidence seized. A suppression hearing was commenced before a United States Magistrate Judge who heard the testimony of only one of the government's several witnesses. Over the petitioner's objection, the District Court completed the suppression hearing after obtaining from the magistrate a determination that the one government witness heard was credible. After the District Court denied the motions by all defendants to suppress evidence, Torres pled guilty. The petitioner and Chaves went to trial and were convicted as

charged. (App. 3).

The petitioner and Chaves appealed to the United States Court of Appeals for the Eleventh Circuit. The petitioner claimed that the warrantless entry and search of the warehouse violated the Fourth Amendment. The government claimed that the warrantless entry and search of the warehouse constituted a "protective sweep" pursuant to *Maryland v. Buie*, 494 U.S. 325, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990). The Court of Appeals rejected the government's claim on the ground that the requisites for a protective sweep had not been met. (App. 7-9). The court therefore concluded that "the warrantless entry violated the Fourth Amendment...". (App. 9).

Nevertheless, the judgment of the District Court denying the motion to suppress was affirmed by the Court of Appeals based in pertinent part upon its interpretation of *Murray v. United States*, 487 U.S. 533, 108 S.Ct. 2529, 101 L.Ed.2d 472 (1988). (App. 9-10). In *Murray*, this Court held that for a search and seizure pursuant to a search warrant to be deemed independent of an earlier illegal entry, the government is required to prove that: (1) the illegally obtained information did not prompt the officers to seek a search warrant; and (2) the illegally obtained information did not affect the decision of the magistrate to issue the warrant. *Id.*, at 542, 108 S.Ct. at 2536.

The Court of Appeals reasoned that because "there is nothing in the record to suggest that the police officers sought the warrant because of what they saw during the illegal entry into the warehouse" (App. 10), the requirements of *Murray* were satisfied and the information acquired as a result of the illegal entry could then be redacted from the search warrant affidavit. The court concluded that after such a redaction, the affidavit provided probable cause to search the warehouse thereby warranting affirmance of the District Court's denial of the petitioner's motion to suppress. (App. 10). The petitioner's motion for rehearing and suggestion for rehearing en banc were denied. (App. 11-13).

ARGUMENT

I.

THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH *MURRAY v. UNITED STATES*, 487 U.S. 533, 108 S.Ct. 2529, 101 L.Ed.2d 472 (1988).

In *United States v. Segura*, 663 F.2d 411 (2d Cir.1981), the Second Circuit affirmed the district judge's suppression of evidence which had been initially observed by officers following an illegal entry which took place before a search warrant was obtained. This Court granted certiorari and in *Segura v. United States*, 468 U.S. 796, 104 S.Ct. 3380, 82 L.Ed.2d 599 (1984), left untouched the aforementioned portion of the decision of the Second Circuit (because the government did not challenge it) but did suggest that suppression of all evidence observed during such an illegal entry could be required. See *id.*, at 811-12 ("[O]fficers who enter illegally will recognize that whatever evidence they discover as a direct result of the entry may be suppressed, as it was by the Court of Appeals in this case.").

In *Murray v. United States*, 487 U.S. 533, 108 S.Ct. 2529, 101 L.Ed.2d 472 (1988), this Court held that for a search and seizure pursuant to a search warrant to be deemed independent of an earlier illegal entry, the government was required to meet the following two prongs: (1) the illegally obtained information did not prompt the officers to seek a search warrant; and (2) the illegally obtained information did not affect the decision of the magistrate to issue the warrant. *Id.*, at 542, 108 S.Ct. at 2536. The second prong requires a judicial determination "whether the actual illegal search had any effect in producing the warrant". *Id.*, at 542 n.3, 108 S.Ct. at 2536 n.3.

With regard to the first prong, the decision below conflicts with *Murray* by placing the burden upon the

petitioner, rather than upon the government, as follows: "[T]here is nothing in the record to suggest that the police officers sought the warrant because of what they saw during the illegal entry into the warehouse." (App. 10). Under *Murray*, the government was required to prove that the agents' illegal observation of the boxes in the warehouse did not affect their decision to seek a search warrant. As for what the record suggests, in view of the agents' inclusion in the affidavit of that key observation, the government did not satisfy the first prong of *Murray*.

Moreover, where, as here, it is claimed that the searching officers possessed probable cause to obtain a search warrant before they unconstitutionally effected a warrantless entry, *Murray* places upon the government an even greater burden:

> An officer with probable cause sufficient to obtain a search warrant would be foolish to enter the premises first in an unlawful manner. By doing so, he would risk suppression of all evidence on the premises, both seen and unseen, since his action would add to the normal burden of convincing a magistrate that no information gained from the illegal entry affected either the law enforcement officers' decision to seek a warrant or the magistrate's decision to grant it.

Murray, 487 U.S. at 540, 108 S.Ct. at 2534. The burden upon the government is also heavy where, as in the case at bar, the "seized goods [were] kept in the police's possession." *Id.*, at 542, 108 S.Ct. at 2535.

Thus, the decision of the Court of Appeals conflicts with *Murray* not only because of the misallocation of the burden of proof, but also because the government was not held to an especially heavy burden of proof. Certiorari review is requested to address this conflict.

There is additional conflict with *Murray* because the Court of Appeals overlooked entirely the second prong which requires a judicial determination "whether the actual illegal search had any effect in producing the warrant". *Murray*, 487 U.S. at 542 n.3, 108 S.Ct. at 2536 n.3. Certiorari review is sought to resolve this conflict with *Murray* as well.

The decision of the Court of Appeals also conflicts with the requirement of *Murray* that the trial court "explicitly find that the agents would have sought a warrant if they had not earlier entered". *Murray*, 487 U.S. at 543, 108 S.Ct. at 2531. Accord, *United States v. Hill*, 55 F.3d 479, 481 (9th Cir.1995). In conflict with this requirement, the Court of Appeals failed to remand the cause to the District Court even though the District Court made no findings on the issue. Certiorari review is requested to resolve this conflict.

On the merits, a proper application of *Murray* should result in reversal with directions to suppress the evidence in the warehouse. First, without the illegal information, the affidavit lacks probable cause to reasonably believe that additional cocaine would be in the warehouse. In fact, according to the affidavit's recitation of the information given the agents by the informant, the entirety of the cocaine would be loaded into the van, thereby leaving none in the warehouse. By finding probable cause despite the foregoing, the Court of Appeals has, in effect, ruled that whenever items are loaded from a warehouse into a vehicle, there is probable cause to believe there are more of the same items in the warehouse. There is no support in the law or logic for such a view of probable cause. See *Ornelas v. United States*, 517 U.S. 690, 695, 116 S.Ct. 1657, 1661, 134 L.Ed.2d 911 (1996) ("probable cause" is a "commonsense, nontechnical conception[] that deal[s] with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.") (internal quotation marks and citations omitted).

Second, the government failed to prove, as required by *Murray*, that the magistrate was not influenced by the

inclusion in the affidavit of the agents' illegal observation. Indeed, it would be difficult to imagine how the government could meet this burden where the illegal observation included in the affidavit was that the agents saw boxes in the warehouse which were identical to boxes found in a van which left the warehouse and which were found to contain cocaine. The magistrate could not reasonably be expected to turn down the affiant's search warrant request in the face of such an allegation, unless the affiant also informed the magistrate that the observation was made pursuant to a non-consensual and illegal break-in. But the affiant withheld that fact from the magistrate.

II.

THE REDACTION APPROACH OF *FRANKS v. DELAWARE*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978) SHOULD NOT APPLY TO THE INCLUSION OF ILLEGALLY OBTAINED INFORMATION IN AN AFFIDAVIT FOR A SEARCH WARRANT.

An additional related issue worthy of review arises from the Court of Appeal's redaction of the illegally obtained information from the search warrant affidavit. Citing its own decision in *United States v. Glinton*, 154 F.3d 1245, 1254-55 (11th Cir.1998), the Court of Appeals made the broad statement that "[u]nder this Circuit's precedents, where, as here, the search warrant affidavit is based on information acquired as a result of an illegal entry, we must look to whether the other information provided in the affidavit is sufficient to support a probable cause finding". (App. 9). As authority for such redaction, *Glinton* cites only to the decision of this Court in *Segura*. But in *Segura*, this Court did not approve redaction in a case where a search warrant application alleged information based upon an illegal entry. Indeed, this

Court has never extended the practice of redaction to "cure" an illegal entry which preceded the issuance of a search warrant.

The redaction process was approved by this Court in a different context. In *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978), this Court held that a search based upon a warrant that contains deliberately or recklessly false allegations is invalid unless, after redaction of those allegations, the affidavit still provides probable cause. Whether the redaction approved in *Franks* should apply to the *Murray* prongs is an issue warranting resolution by this Court. As the Seventh Circuit stated in *United States v. Markling*, 7 F.3d 1309, 1317 (7th Cir.1993), the second prong in *Murray* "could be read as casting doubt on [a] *Franks*-based approach to determining whether a search pursuant to a tainted warrant will support admission of evidence under the independent source doctrine." See also *United States v. Veillette*, 778 F.2d 899, 904 (1st Cir.1985) (Bownes, J., dissenting), cert. denied, 476 U.S. 1115, 106 S.Ct. 1970, 90 L.Ed.2d 654 (1986).[1] Thus, this issue is worthy of review as well.

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[1] Judge Bownes reasoned in pertinent part as follows: "The majority recognizes that it is stretching *Segura* out of context so it turns to *Franks v. Delaware* [citation omitted] to justify its validation of the warrant. With due respect, I do not think *Franks* applies. The difference between *Segura*, the instant case, and *Franks* is that in *Franks* there was no illegal entry. *Franks* was directed to the problem of using deliberate falsehoods or recklessly disregarding the truth in order to obtain a warrant. In transferring the excision approach of *Franks* to this case, my brothers have completely eviscerated *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963) ... [quotation omitted]. *Id.*, at 905. The inclusion of illegally obtained information in an affidavit for a search warrant is bound to taint the magistrate's determination of whether the warrant should issue. The question is not, as in *Franks*, whether the warrant can stand if the false statements are set aside, but whether the magistrate is able to make an objective and careful scrutiny of the affidavit in order to decide if a search warrant should issue. See *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 3417, 82 L.Ed.2d 677 (1984) and cases cited therein." *Id.* at 905.

III.

THE FEDERAL MAGISTRATES ACT DOES NOT AUTHORIZE A MAGISTRATE TO HEAR, OVER THE OBJECTION OF A PARTY, THE TESTIMONY OF ONLY ONE OF SEVERAL WITNESSES IN A SUPPRESSION MATTER AND OPINE FOR THE DISTRICT JUDGE, WHO THEREAFTER HEARS THE BALANCE OF THE MATTER, WHETHER THAT ONE WITNESS WAS CREDIBLE.

Magistrate judges draw their authority from an exercise of Congressional power under Article I of the Constitution and therefore may not exceed the limitations prescribed by Congress. See *United States v. Raddatz*, 447 U.S. 667, 100 S.Ct. 2406, 65 L.Ed.2d 424 (1980). See also *NLRB v. A-Plus Roofing, Inc.*, 39 F.3d 1410, 1415 (9th Cir.1994) ("Federal magistrates are creatures of statute, and so is their jurisdiction. [Courts] cannot augment it [and] cannot ask them to do something Congress has not authorized them to do.").

The statute which prescribes the process of referring matters to a United States Magistrate Judge is § 636 of Title 28 of the United States Code. § 636(b)(1)(B) authorizes a district judge to designate a magistrate to "conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A)...". One of the motions excepted in subparagraph (A) is the one at issue here, namely, a motion to suppress evidence in a criminal case.

Subparagraph (C) requires the magistrate to file the proposed findings and recommendations with the court and allows a party to file written objections to the proposed

findings and recommendations as provided by rules of court. The district judge shall then make a *de novo* determination of those portions objected to and may accept, reject, or modify, in whole or in part, the magistrate's findings. The judge may also receive further evidence. The referral process contemplates that "the district court has the benefit of a carefully developed record, a magistrate's thoughtful consideration of the issues, and argument of counsel regarding specifics not agreeable to the parties." *United States. v. Marshall*, 609 F.2d 152, 155 (5th Cir.1980) (quoting *United States v. Whitmire*, 595 F.2d 1303, 1305 (5th Cir.1979)).

Congress has not authorized the magistrate to do what he did here, namely, hear only (over the objection of the accused) a portion of a suppression matter and pass only upon the credibility of one witness where the entire matter did not conclude before the magistrate and therefore did not result in statutorily mandated "proposed findings of fact and recommendations for the disposition ..." of the matter. While it is true in *Raddatz* this Court held that where a magistrate enters findings and recommendations following an evidentiary hearing that neither the Federal Magistrates Act nor constitutional guarantees require that the district judge rehear the testimony, in the case at bar, there were no such findings or recommendations and counsel were not afforded the opportunity to object because the evidentiary hearing did not conclude before the magistrate. Consequently, the testimony of the sole witness heard by the magistrate was presented in a vacuum without the benefit of the balance of the testimony of the other witnesses, arguments of counsel, or objections of counsel, which are statutorily required. *Marshall, supra.*

The Court of Appeals agreed that the procedure employed here was erroneous but declined to reverse on the basis of "the specific circumstances here" but offering no explanation. (App. 3-4). Certiorari review is respectfully requested to address the Court of Appeal's construction of the Federal Magistrates Act and determine the relief which should be afforded for the violation of the Act which took place here.

Respectfully submitted,

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UNITED STATES of America, Plaintiff-Appellee,

v.

Frank CHAVES and Rafael Garcia, Defendants-Appellants.

No. 97-5864.

United States Court of Appeals,

Eleventh Circuit.

Entered: March 9, 1999.

Appeals from the United States District Court for the Southern District of Florida. (No. 96-1013-CR-SH), Shelby Highsmith, Judge.

Before HATCHETT, Chief Judge, BARKETT, Circuit Judge, and RONEY, Senior Circuit Judge.

BARKETT, Circuit Judge:

Frank Chaves and Rafael Garcia appeal their convictions for conspiring to possess cocaine with intent to distribute, in violation of 21 U.S.C. " 841(a)(1) and 846, and for possessing cocaine with the intent to distribute in violation of 21 U.S.C. ' 841(a)(1). Garcia also appeals from his conviction for knowingly carrying a firearm in relation to a drug trafficking offense in violation of 18 U.S.C. ' 924(c).

BACKGROUND

On December 12, 1996, agents of the Drug Enforcement Administration ("DEA") received information from a confidential informant relating to drug trafficking in Miami, Florida. Based on the information provided, the DEA developed a plan to seize approximately 240 kilograms of

cocaine using the informant's van. The informant was to provide the keys to the van to a third person, who would then pick up the drugs and return with the van. Although DEA agents surveilled the food court at the shopping mall where the hand-off of the keys was to take place, they did not see the person to whom the informant gave the keys. DEA agents, however, did see Frank Chaves drive off in the informant's van. Using both car and helicopter, the DEA surveilled the van. Chaves, driving the informant's van, stopped at a warehouse in Hialeah Gardens, and departed a short time thereafter. Chaves then drove the van to a Miami Subs restaurant and entered. While Chaves was in the restaurant, a DEA agent approached the van and saw several boxes in an area that was previously empty. DEA agents then proceeded to arrest Chaves and search the van, seizing ten boxes containing 240 kilograms of cocaine, some money, and keys belonging to Chaves.[1]

Shortly after arresting Chaves, DEA agents, who were still surveiling the warehouse, arrested Rafael Garcia and John Torres as they exited the warehouse. Both men were carrying firearms at the time of their arrest. The door of the warehouse was locked and none of the keys taken from Garcia and Torres could open the warehouse. The agents at the warehouse then waited approximately forty-five minutes outside the warehouse with Garcia and Torres in custody. At this time, the agents at the warehouse, who had been joined by those arresting Chaves, conducted a warrantless entry of the warehouse, which was opened by "jimmying" the door using a knife blade. During the sweep of the warehouse, which lasted approximately five to ten minutes, the agents saw boxes similar to those found in the van.

At this point, a search warrant affidavit was drafted, relying on information obtained both before and as a result of the warrantless entry. Late in the evening of December 12, a search warrant was obtained for the warehouse and executed.

[1] These keys, it turned out, were to the warehouse.

As a result of the execution of the warrant, DEA agents found approximately 400 kilograms of cocaine, as well as packaging material, boxes, gloves and items belonging to Chaves.

Chaves, Garcia, and Torres were subsequently indicted. After the district court denied motions by all the defendants to suppress evidence obtained by the DEA agents, Torres pled guilty. Chaves and Garcia went to trial and they were convicted as charged.[2] This appeal followed.

DISCUSSION

On appeal, both Chaves and Garcia argue that the search of the van and the warrantless entry at the warehouse violated their Fourth Amendment rights and, therefore, their motions to suppress the cocaine seized from the van and at the warehouse should have been granted. Chaves claims that the district court erred in ruling that he did not have standing to challenge the entry of the warehouse, while Garcia argues that the district court erred in ruling that he did not have standing to challenge the search of the van. Both defendants also argue that the district court erred in denying their motions to disclose the identity of the confidential informant. Finally, Garcia argues that because the district court took over the suppression hearing from the magistrate judge after the magistrate judge had taken the testimony of one witness, he is entitled to a new suppression hearing.

Initially, we find no abuse of discretion in the trial court's denial of the motion to disclose the confidential informant. Likewise, we find no reversible error in Garcia's claim that the district court should not have completed the suppression hearing after the magistrate judge had already heard from one witness. Although we agree with Garcia that 28 U.S.C. ' 636, which authorizes magistrate judges to hold

[2] The district court granted a motion for judgment of acquittal in favor of Chaves on the charge of carrying a firearm in relation to a drug trafficking offense.

hearings on motions to suppress, does not allow a district court and a magistrate judge to hear a motion to suppress together, cutting off the ability to object to the magistrate judge's credibility findings, we do not find that, under the specific circumstances here, reversal is warranted.

With reference to the Fourth Amendment issues raised, we turn first to the question whether Chaves' and Garcia's respective Fourth Amendment rights were implicated by the searches conducted by the police officers in this case. Although the parties label this inquiry as a question of standing, as did the district court, the Supreme Court recently reminded us that the question " 'is more properly placed within the purview of substantive Fourth Amendment law than within that of standing.' " *Minnesota v. Carter,* --- U.S. ----, 119 S.Ct. 469, 472, --- L.Ed.2d ---- (1998) (quoting *Rakas v. Illinois,* 439 U.S. 128, 140, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978)). As *Carter* teaches, "in order to claim the protection of the Fourth Amendment, a defendant must demonstrate that he personally has an expectation of privacy in the place searched, and that his expectation is reasonable...." *Id.; see also United States v. Cooper,* 133 F.3d 1394, 1398 (11th Cir.1998).

Taking Garcia's claim first, we find no error in the district court's determination that Garcia lacked a reasonable expectation of privacy in the van. Garcia advances no facts to support any claim of an expectation of privacy in the van other than a claim that the contraband in the van belonged to him. This, however, cannot establish that Garcia's Fourth Amendment rights were implicated by the search of the van. Garcia must show that he had a reasonable expectation of privacy in the place searched and he has failed to do so. "A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed." *Rakas,* 439 U.S. at 134, 99 S.Ct. 421.

Chaves, on the other hand, did have a reasonable expectation of privacy in the warehouse, and the district court

erred in its finding to the contrary. As the government recognizes, lack of ownership is not dispositive. *See United States v. Garcia,* 741 F.2d 363, 365-66 (11th Cir.1984) ("[L]egal ownership is not a prerequisite for a legitimate expectation of privacy."). As the Supreme Court has recognized, in a variety of contexts, even where a defendant does not own the property searched, he or she may nonetheless have a reasonable expectation of privacy in that place by virtue of his or her relationship with that place. *See Carter,* 119 S.Ct. at 474 (holding that defendants lacked a legitimate expectation of privacy because they did not have a relationship with the home owner, but rather were "simply permitted on the premises"); *id.* at 478-79 (Kennedy, J., concurring) (recognizing that "almost all social guests have a legitimate expectation of privacy, and hence protection against unreasonable searches, in their host's home," but finding no such expectation here because defendants only had a "fleeting and insubstantial connection with Thompson's home"); *Minnesota v. Olson,* 495 U.S. 91, 96-100, 110 S.Ct. 1684, 109 L.Ed.2d 85 (1990) (holding that an overnight guest had a legitimate expectation of privacy in his host's home); *O'Connor v. Ortega,* 480 U.S. 709, 714-19, 107 S.Ct. 1492, 94 L.Ed.2d 714 (1987) (recognizing that, in some circumstances, an employee has a reasonable expectation of privacy in his or her workplace).

Although Chaves did not own or formally rent the warehouse, we believe that his connection to the warehouse was sufficient to establish a reasonable expectation of privacy in the warehouse. *See United States v. Baron-Mantilla,* 743 F.2d 868, 870 (11th Cir.1984) (finding that defendant, who did not own or rent premises searched, "could have established a legitimate expectation of privacy by demonstrating 'an unrestricted right of occupancy or custody and control of the premises as distinguished from occasional presence on the premises as a mere guest or invitee.' ") (quoting *United States v. Bachner,* 706 F.2d 1121, 1126 n. 6 (11th Cir.1983)). The circumstances here lead us to conclude that Chaves was no

"mere guest or invitee," but instead was much closer to that of one who maintained both "custody and control" of the warehouse. Chaves had the only key to the warehouse, giving him a measure of control and ability to exclude others. While possession of a key, without more, might not be sufficient to establish a reasonable expectation of privacy, *see Baron-Mantilla,* 743 F.2d at 870, Chaves seems to have had the only key and, what is more, he also kept personal and business papers at the warehouse. In these circumstances, the Fourth Amendment protects Chaves' privacy interests in the warehouse. *See Rakas,* 439 U.S. at 149, 99 S.Ct. 421 (recognizing that defendant in *Jones v. United States,* 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960) "could legitimately expect privacy" where he obtained a key to friend's apartment, giving him "complete dominion and control over the apartment," and he kept possessions there). The government makes much of the fact that Chaves maintained his principal place of business in another warehouse. Under the Fourth Amendment, however, an individual is not limited to one place of business; the Fourth Amendment protects the reasonable expectation of privacy he or she has in multiple places. *See Olson,* 495 U.S. at 96 n. 5, 110 S.Ct. 1684 (noting that the Fourth Amendment "provides sanctuary for citizens wherever they have a legitimate expectation of privacy").

We recognize that "[p]roperty used for commercial purposes is treated differently for Fourth Amendment purposes than residential property." *Carter,* 119 S.Ct. at 474. The Supreme Court has recognized that an "expectation of privacy in commercial premises ... is different from, and indeed less than, a similar expectation in an individual's home." *New York v. Burger,* 482 U.S. 691, 700, 107 S.Ct. 2636, 96 L.Ed.2d 601 (1987). Certainly, the government's ability to conduct searches of a warehouse is far broader than its ability to search a residence. The fact that Chaves has a lesser expectation of privacy in the warehouse vis-a-vis a residence, however, does not mean that he has no legitimate expectation of privacy in the warehouse. Accordingly, we find, in the particular

circumstances presented here, that the district court erred in concluding that Chaves lacked a reasonable expectation of privacy in the warehouse searched by the police.

We now turn to consider appellants' arguments that the searches in this case violated the Fourth Amendment. Chaves argues that cocaine seized from his van should be suppressed because he was arrested without probable cause, making the search of the van incident to arrest impermissible. In the circumstances of this case, however, we find that the district court did not err in concluding that the police had probable cause to arrest Chaves. As noted above, the confidential informant told the police that the van, which Chaves was driving, was to be loaded with cocaine, the van was observed stopping briefly at a warehouse, and, immediately afterwards, boxes were observed in a previously empty area of the van. These facts, we conclude, were sufficient to establish probable cause to arrest Chaves and search the van and seize its contents incident to that arrest. *See United States v. Diaz-Lizaraza,* 981 F.2d 1216, 1222 (11th Cir.1993). We hold, however, that the initial warrantless entry of the warehouse under the auspices of conducting a "protective sweep" did not comport with the Fourth Amendment. In *Maryland v. Buie,* 494 U.S. 325, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990), the Supreme Court held that a properly limited protective sweep, conducted incident to an arrest, is permitted under the Fourth Amendment only "when the searching officer possesses a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene." *Id.* at 337, 110 S.Ct. 1093. The Court in *Buie* permitted police officers to undertake protective sweeps in these instances because of the compelling "interest of the officers in taking steps to assure themselves that the house in which a suspect is being, or has just been, arrested is not harboring other persons who are dangerous and who could unexpectedly launch an attack," emphasizing that the intrusion was limited to "no more than necessary to protect the officer from harm." *Id.* at

333, 110 S.Ct. 1093.

Here, the government's own action undermines any claim that the entry had a protective purpose. It is undisputed that the sweep in this case did not immediately follow the arrest of Garcia and Torres outside the locked warehouse, but occurred a substantial time after the agents arrested Garcia and Torres. During the interim period, approximately forty-five minutes, the officers simply sat in their cars outside the warehouse. The agents, thus, saw no immediate need to enter the warehouse to protect themselves or other persons in the area. *Buie* requires officers to have "a reasonable basis for believing that their search will reduce the danger of harm to themselves or of violent interference with their mission," *id.* at 337, 110 S.Ct. 1093 (Stevens, J., concurring) and the facts show no such basis here.

Moreover, the government has failed to point to any "specific and articulable" facts that would lead a reasonably prudent officer to believe that, at the time of the sweep, a sweep was necessary for protective purposes. Much of the government's argument why a sweep was needed for protective purposes is not based on any specific facts in the government's possession, but rather is based on the lack of information in the government's possession. The testimony at the suppression hearing indicates that the officers had no information regarding the inside of the warehouse. However, in the absence of specific and articulable facts showing that another individual, who posed a danger to the officers or others, was inside the warehouse, the officers' lack of information cannot justify the warrantless sweep in this case. *See United States v. Colbert,* 76 F.3d 773, 778 (6th Cir.1996) ("Lack of information cannot provide an articulable basis upon which to justify a protective sweep."); *see also Sharrar v. Felsing,* 128 F.3d 810, 825 (3d Cir.1997) ("agree[ing] with ... *Colbert* that '[n]o information cannot be an articulable basis for a sweep that requires information to justify it in the first place' ").

The government also points to the fact that Garcia and

Torres were arrested with weapons in their possession. However, this information "implies nothing regarding the possible presence of anyone being in [the warehouse] "the touchstone of the protective sweep analysis." *Sharrar,* 128 F.3d at 825; *see also Colbert,* 76 F.3d at 777 ("The facts on which officers may justify a *Buie* protective sweep are those facts giving rise to a suspicion of danger from an attack by a third party during the arrest, not the dangerousness of the arrested individual."). Finally, the government notes that one of the agents believed that there was a large shipment of cocaine in the warehouse, making it unlikely that the cocaine would be left unguarded. However, none of the agents were able to see inside the warehouse and none of the agents offered any concrete factual basis for believing that there was either additional cocaine or individuals inside the warehouse. This is exactly the kind of "mere 'inchoate and unparticularized suspicion or hunch' " that *Buie* indicates is insufficient to support a warrantless sweep. *Buie,* 494 U.S, at 332, 110 S.Ct. 1093 (quoting *Terry v. Ohio,* 392 U.S. 1, 27, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)).[3]

Having found that the warrantless entry violated the Fourth Amendment, we must consider whether the results of the subsequent search, conducted after the warrant was finally obtained, should have been suppressed. Under this Circuit's precedents, where, as here, the search warrant affidavit is based on information acquired as a result of an illegal entry, we must look to whether the other information provided in the affidavit is sufficient to support a probable cause finding. *United States v. Glinton,* 154 F.3d 1245, 1254-55 (11th Cir.1998). If so, suppression is not required because "the exclusionary rule has no application where the government learned of the evidence from an independent source," *id.* at 1255, provided, of course, that "the agents' decision to seek the

[3] The government also notes that there was a cafeteria and a school in the vicinity of the warehouse. However, the testimony showed that there were no civilians near the warehouse at any time leading up to the warrantless entry.

warrant was [not] prompted by what they had seen during the initial entry...." *Murray v. United States,* 487 U.S. 533, 542, 108 S.Ct. 2529, 101 L.Ed.2d 472 (1988). *Accord United States v. Markling,* 7 F.3d 1309, 1314-18 (7th Cir.1993); *United States v. Restrepo,* 966 F.2d 964, 968-72 (5th Cir.1992); *United States v. Herrold,* 962 F.2d 1131, 1139-44 (3d Cir.1992); *United States v. Gillenwaters,* 890 F.2d 679, 681-82 (4th Cir.1989); *United States v. Salas,* 879 F.2d 530, 536-39 (9th Cir.1989); *United States v. Veillette,* 778 F.2d 899, 903-04 (1st Cir.1985). Even discounting that portion of the affidavit describing information uncovered during the unconstitutional warrantless entry, the balance of the affidavit supports a finding of probable cause. Further, there is nothing in the record to suggest that the police officers sought the warrant because of what they saw during the illegal entry into the warehouse. In light of the information from the confidential informant, the fact that the previously-empty van was seized with cocaine just after a short stop at the warehouse, and the seizure of Garcia and Torres, all of which supported the search warrant, we cannot say that the officers were prompted to seek a warrant based on what they had seen during the unconstitutional warrantless entry. Under *Glinton,* therefore, the district court did not err in admitting as evidence the cocaine and other items seized at the warehouse.

Accordingly, the judgment of the district court is AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH DISTRICT

No. 97-5864

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FRANK CHAVES, RAFAEL GARCIA,

Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of Florida

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Entered: June 29, 1999

BEFORE: HATCHETT and BARKETT, Circuit Judges, and RONEY, Senior Circuit Judge.*

PER CURIAM:

The petition(s) for rehearing filed by Appellants, Rafael Garcia and Frank Chaves, are DENIED.

ENTERED FOR THE COURT:

/S/ Rosemary Barkett
UNITED STATES CIRCUIT JUDGE

*This decision is rendered by a quorum, due to the retirement of then-Chief Judge Hatchett on May 14, 1999. 28 U.S.C. §46(d).

IN THE UNITED STATES COURT OF APPEAL
FOR THE ELEVENTH CIRCUIT

No. 97-5864

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FRANK CHAVES, RAFAEL GARCIA,

Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of Florida

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Entered: June 29, 1999

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC (Opinion _____, 11th Cir., 19__, ___F2d ____).

BEFORE: HATCHETT and BARKETT, Circuit Judges, and RONEY, Senior Circuit Judge.*

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/S/ Rosemary Barkett
UNITED STATES CIRCUIT JUDGE

*This decision is rendered by a quorum, due to the retirement of then-Chief Judge Hatchett on May 14, 1999. 28 U.S.C. §46(d).

ORD-42
(6/95)

AFFIDAVIT

I, John Arvanitis, (hereafter your affiant) being duly sworn, do hereby depose and state the following:

1. The affiant is employed by the United States Department of Justice, Drug Enforcement Administration (DEA) as a special agent and has been so employed for the past 9 years.

2. The affiant has worked with the confidential informant (CI) in this case for the past year, and has found the CI to be accurate and reliable. Specifically, the CI has provided the affiant with information which has resulted in seizures of large quantities of cocaine and U.S. currency.

3. On December 12, 1996, the CI received a cellular telephone number to contact an unknown person so that the CI could take receipt of a large quantity of cocaine.

4. A meeting was arranged so that a vehicle could be provided to the unknown individual in which to load the cocaine.

5. At approximately 4:10 p.m. on December 12, 1996, federal agents observed an individual later identified as Frank Chavez enter the vehicle that was provided to him in order to facilitate the delivery of the cocaine.

6. A surveillance of Frank Chavez revealed that he entered the vehicle provided to him and drove to a warehouse located at 13199 Northwest 107 Avenue #2A, Hialeah Gardens, Florida.

7. At approximately 4:45 p.m. on December 12, 1996, federal agents observed Frank Chavez exit the warehouse previously described.

8. Agents observed Frank Chavez drive the vehicle from the warehouse to the parking lot of the Miami Subs restaurant located at 103rd Street and 16th Avenue in Hialeah, Florida.

9. As Frank Chavez exited the vehicle he was detained by federal agents, while other agents entered the vehicle and observed several cardboard boxes therein.

10. An inspection of one of the cardboard boxes revealed that it contained several bricks of a white powdery substance. A field test of one of the bricks tested positive for the presence of cocaine. It is estimated that there are approximately 240 kilograms of cocaine in the vehicle.

11. At approximately 5:30 p.m. two individuals identified as John Torres and Rafael Garcia were observed leaving the warehouse. They were detained and searched and each one was found to be in possession of a firearm.

12. The agents conducted a safety sweep of the warehouse and observed other cardboard boxes inside the warehouse similar to those found in the vehicle driven by Frank Chavez.

Wherefore, the affiant respectfully requests that this Court issue a search warrant authorizing a search of the premises located at 13199 Northwest 107 Avenue #2A Hialeah Gardens, Florida for evidence of narcotics dealing as well as conspiracy in violation of Title 21, United States Code, Sections 841(a)(1) and 846.

Further affiant sayeth naught.

/S/John Arvanitis
John Arvanitis, Special Agent

Drug Enforcement Administration

Sworn and subscribed to
before me this 12th day of
December 1996.

/S/ Judge
United States Magistrate Judge